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JUN 12 2003

BANKRUPTCY COURT  
OAKLAND, CALIFORNIA

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 02-41619 J

Adv. No. 02-4896 J

GUY PHILIP EGERTON,

Debtor. /

FREDERICK ASHOURI,

Plaintiff,

vs.

GUY PHILIP EGERTON, DOWNEY  
SAVINGS AND LOAN, et. al.

Defendants. /

and related counterclaim

DECISION

By this action and counterclaim, the parties seek a determination as to the validity of a certain deed of trust which defendant Guy Philip Egerton, the above debtor ("Egerton"), executed in favor of plaintiff Frederick Ashouri ("Ashouri"), and related relief. Egerton has moved for summary judgment or partial summary judgment pursuant to Fed. R. Civ. P. 56, applicable herein via Fed. R. Bankr. P. 7056. The primary issue presented is whether Ashouri violated the Federal Truth in Lending Act, 15 USC § 1601 et. seq.

Decision

1 ("TILA"), Home Ownership and Equity Protection Act, 15 USC § 1639  
2 ("HOEPA"), and Regulation Z, 12 CFR § 226.31 and 226.32 in  
3 connection with the loan secured by the subject deed of trust such  
4 as to entitle Egerton to rescind the deed of trust. The court will  
5 grant partial summary judgment in favor of Egerton, and permit him  
6 to rescind the deed of trust at issue, subject to his compliance  
7 with his proposal set forth at pages 7 - 8 of his Supplemental  
8 Memorandum filed May 16, 2003, modified as provided below.

9 A. Background

10 Although some facts are in dispute, those material to the  
11 motion before the court are undisputed. On June 4, 2001, Egerton  
12 signed a promissory note in favor of Ashouri in the principal sum of  
13 \$35,000, together with a third-priority deed of trust to secure the  
14 note, which deed of trust encumbered Egerton's residence in  
15 Pleasanton, California. After certain deductions, Egerton received  
16 loan proceeds totaling \$31,700. Ashouri did not furnish Egerton  
17 with any of the disclosures required by TILA, HOEPA, or Regulation  
18 Z.

19 Egerton defaulted on senior notes, and on March 26, 2002, filed  
20 a chapter 13 petition herein. Approximately three months later,  
21 Egerton, through counsel, notified Ashouri that Egerton had elected  
22 to rescind the loan, see 15 USC § 1635(a)<sup>1</sup>, because Ashouri had

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23 <sup>1</sup>15 USC § 1635(a) provides in relevant part:

24 Except as otherwise provided in this section, in the case of  
25 any consumer credit transaction . . . in which a security  
26 interest, including any such interest . . . is or will be

(continued...)

1 violated the TILA, HOEPA, and Regulation Z by failing to provide  
2 Egerton with the disclosures and notices required thereunder. The  
3 letter demanded that Ashouri release his deed of trust within 20  
4 days pursuant to 15 USC § 1635(b).<sup>2</sup>

5 Ashouri refused to release his deed of trust, taking the  
6 position that the loan transaction was exempted from TILA and HOEPA  
7 because Ashouri was not a "creditor" that was subject to the  
8 statutes, and because the loan to Egerton was not "consumer credit"  
9 that entitled Egerton to the protections of the statutes.  
10 Thereafter, Ashouri filed the present adversary proceeding.

11  
12 <sup>1</sup>(...continued)

13 retained or acquired in any property which is used as the  
14 principal dwelling of the person to whom credit is extended,  
15 the obligor shall have the right to rescind the transaction  
16 until midnight of the third business day following the  
17 consummation of the transaction or the delivery of the  
18 information and rescission forms required under this section  
19 together with a statement containing the material  
20 disclosures required under this subchapter, whichever is  
21 later, by notifying the creditor, in accordance with  
22 regulations of the Board, of his intention to do so.

23 <sup>2</sup>15 USC § 1635(b) provides in relevant part:

24 When an obligor exercises his right to rescind under  
25 subsection (a) of this section, he is not liable for any  
26 finance or other charge, and any security interest given by  
the obligor, including any such interest arising by  
operation of law, becomes void upon such a rescission.  
Within 20 days after receipt of a notice of rescission, the  
creditor shall return to the obligor any money or  
property given as earnest money, downpayment, or otherwise,  
and shall take any action necessary or appropriate to  
reflect the termination of any security interest created  
under the transaction.

1 The issues presented by Egerton's motion for summary judgment  
2 are whether, at the time of the loan, Ashouri was a "creditor" as  
3 defined for purposes of TILA and HOEPA, and whether the loan  
4 qualifies as "consumer credit" thereunder. To prevail on his motion  
5 for summary judgment, Egerton must prevail as to both these issues.

6 B. Ashouri Was a "Creditor"

7 15 USC § 1602(f) sets forth a lengthy and complex definition of  
8 "creditor." For present purposes, the relevant portion reads as  
9 follows:

10 The term "creditor" refers only to a person who both (1)  
11 regularly extends, whether in connection with loans, sales  
12 of property or services, or otherwise, consumer credit  
13 which is payable by agreement in more than four  
14 installments or for which the payment of a finance charge  
15 is or may be required, and (2) is the person to whom the  
16 debt arising from the consumer credit transaction is  
17 initially payable on the face of the evidence of  
18 indebtedness or, if there is no such evidence of  
19 indebtedness, by agreement.

20 . . . . .

21 Any person who originates 2 or more mortgages referred to  
22 in subsection (aa) of this section in any 12-month period  
23 or any person who originates 1 or more such mortgages  
24 through a mortgage broker shall be considered to be a  
25 creditor for purposes of this subchapter.

26 The statute is supplemented by 12 CFR § 226.2(a)(17), which  
clarifies that a person "regularly extends credit if, in any  
12-month period, the person originates more than one credit  
extension that is subject to the requirements of § 226.32 . . . ."  
12 CFR § 226.2(a)(17) n.3.

Thus, Ashouri was a "creditor" if the loan to Egerton and at  
least one extension of credit by Ashouri within the preceding year

1 fall within the requirements of 15 USC § 1602(aa)(1)<sup>3</sup> and 12 CFR §  
2 226.32 (which essentially parallels 15 USC § 1602(aa)(1)). The  
3 uncontroverted declaration and amended declaration of Lori A. Wickam  
4 ("Wickam"), who borrowed \$25,000 from Ashouri on December 1, 2000  
5 (within the one year period prior to Ashouri's loan to Egerton) on  
6 the security of her principal residence, and the uncontroverted  
7 declaration and supplemental declaration of Charles H. Oliver, who  
8 analyzed Ashouri's loans to Wickam and Egerton with reference to the  
9 alternate "triggers" under 15 USC § 1602(aa)(1)(A) and (B),  
10 establish that Ashouri's loans to Wickam and Egerton satisfied at  
11 least one of the triggers, and that Ashouri was therefore a  
12 "creditor" with respect to his loan to Egerton.

13 The court so holds.  
14  
15

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16 <sup>3</sup>15 USC § 1602(aa)(1) provides:

17 A mortgage referred to in this subsection means a consumer  
18 credit transaction that is secured by the consumer's  
19 principal dwelling, other than a residential mortgage  
20 transaction, a reverse mortgage transaction, or a  
21 transaction under an open end credit plan, if--

22 (A) the annual percentage rate at consummation of the  
23 transaction will exceed by more than 10 percentage points  
24 the yield on Treasury securities having comparable periods  
25 of maturity on the fifteenth day of the month immediately  
26 preceding the month in which the application for the  
extension of credit is received by the creditor; or

(B) the total points and fees payable by the consumer at or  
before closing will exceed the greater of--

- (i) 8 percent of the total loan amount; or
- (ii) \$400.

1 C. Ashouri Extended "Consumer Credit" to Egerton

2 Egerton would have no right of rescission if the loan at issue  
3 was not a "consumer credit" transaction. 15 USC § 1635(a). 15 USC  
4 § 1602(h) defines "consumer" as follows:

5 The adjective "consumer", used with reference to a credit  
6 transaction, characterizes the transaction as one in which  
7 the party to whom credit is offered or extended is a  
8 natural person, and the money, property, or services which  
9 are the subject of the transaction are primarily for  
10 personal, family, or household purposes.

11 15 USC § 1602(h) is supplemented by 12 CFR § 226.2(11) and (12)  
12 which, in relevant part, defines "consumer" and "consumer credit" as  
13 follows:

14 (11) Consumer means a . . . natural person to whom  
15 consumer credit is offered or extended. However, for  
16 purposes of rescission under §§ 226.15 and 226.23, the  
17 term also includes a natural person in whose principal  
18 dwelling a security interest is or will be retained or  
19 acquired, if that person's ownership interest in the  
20 dwelling is or will be subject to the security interest.

21 (12) Consumer credit means credit offered or extended to a  
22 consumer primarily for personal, family, or household  
23 purposes.

24 Id. Thus, the next issue is whether Ashouri extended "consumer  
25 credit" to Egerton, which turns on the question whether the loan was  
26 "primarily for personal, family, or household purposes." 12 CFR §  
226.2(12).

27 It is undisputed that at the time of the loan, Egerton was  
28 self-employed, doing business out of his home as a recruiter in the  
29 computer technology field. As to the loan at issue, the parties  
30 agree that Egerton dealt primarily with Mr. Tom Givens ("Givens") of  
31 Equity Share Plus, Ashouri's agent. At this point, the declarations

1 diverge. Egerton's declarations state that: (a) Egerton advised  
2 Givens when he requested the loan that the loan was to cover "living  
3 expenses", and (b) Egerton deposited the loan proceeds in his  
4 personal checking account, transferred \$5,000 to his business  
5 checking account, and used the balance of the proceeds exclusively  
6 for living expenses, including mortgage payments, utility bills, and  
7 groceries. Givens's declaration is to contrary, and states that  
8 Egerton "wanted a construction loan to fix up his house for sale."<sup>4</sup>

9 In the summary judgment context, the court must view the  
10 evidence in the light most favorable to the nonmoving party. See,  
11 e.g., Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th  
12 Cir. 1994); Summers v. A. Teichert & Son, Inc., 127 F.3d 1150, 1152  
13 (9th Cir. 1997). The court will therefore assume, without deciding,  
14 that Egerton in fact told Givens that the purpose of the loan was to  
15 fix up his house for sale.

16 It does not follow, however, that the loan was not "primarily  
17 for personal, family, or household purposes." Rather, the court  
18 must examine the transaction as a whole to determine whether it was  
19 primarily consumer or commercial in nature. See, e.g., Tower v.  
20 Moss, 625 F.2d 1161, 1166 (5th Cir. 1980). In doing so, the court  
21 is not without guidance; the Federal Reserve Board ("FRB") official

22 /////

23 /////

24 \_\_\_\_\_  
25 <sup>4</sup>Declarations of Ashouri and Mr. Ken Beasley state that the  
26 purpose of the loan was to fix up the house, but these statements  
appear to be hearsay, and are thus inadmissible.

1 staff interpretation to 12 CFR § 226.3(a)(1)<sup>5</sup> is relevant, Thorns v.  
2 Sundance Properties, 726 F.2d 1417, 1419 (9th Cir. 1984), and  
3 instructive.<sup>6</sup>

4  
5 <sup>5</sup>12 CFR § 226.3(a)(1) provides that "[b]usiness, commercial,  
6 agricultural, or organizational credit" are exempt from  
7 Regulation Z, following 15 USC § 1603(1), which exempts from TILA  
8 "Credit transactions involving extensions of credit primarily for  
business, commercial, or agricultural purposes."

9 <sup>6</sup>The Federal Reserve Board staff interpretation states:

10 1. Primary purposes. A creditor must determine in each case  
11 if the transaction is primarily for an exempt purpose. If  
12 some question exists as to the primary purpose for a credit  
13 extension, the creditor is, of course, free to make the  
14 disclosures, and the fact that disclosures are made under  
such circumstances is not controlling on the question of  
whether the transaction was exempt.

15 2. Factors. In determining whether credit to finance an  
16 acquisition--such as securities, antiques, or art--is  
17 primarily for business or commercial purposes (as opposed to  
18 a consumer purpose), the following factors should be  
considered:

19 . The relationship of the borrower's primary occupation to  
20 the acquisition. The more closely related, the more likely  
it is to be business purpose.

21 . The degree to which the borrower will personally manage  
22 the acquisition. The more personal involvement there is, the  
more likely it is to be business purpose.

23 . The ratio of income from the acquisition to the total  
24 income of the borrower. The higher the ratio, the more  
likely it is to be business purpose.

25 . The size of the transaction. The larger the transaction,  
26 the more likely it is to be business purpose.

(continued...)



<sup>6</sup>(...continued)

. The borrower's statement of purpose for the loan.

Examples of business-purpose credit include:

. A loan to expand a business, even if it is secured by the borrower's residence or personal property.

. A loan to improve a principal residence by putting in a business office.

. A business account used occasionally for consumer purposes.

Examples of consumer-purpose credit include:

. Credit extensions by a company to its employees or agents if the loans are used for personal purposes.

. A loan secured by a mechanic's tools to pay a child's tuition.

. A personal account used occasionally for business purposes.

3. Non-owner-occupied rental property. Credit extended to acquire, improve, or maintain rental property (regardless of the number of housing units) that is not owner-occupied is deemed to be for business purposes. This includes, for example, the acquisition of a warehouse that will be leased or a single-family house that will be rented to another person to live in. If the owner expects to occupy the property for more than 14 days during the coming year, the property cannot be considered non-owner-occupied and this special rule will not apply. For example, a beach house that the owner will occupy for a month in the coming summer and rent out the rest of the year is owner occupied and is not governed by this special rule. See Comment 3(a)-4, however, for rules relating to owner-occupied rental property.

4. Owner-occupied rental property. If credit is extended to  
(continued...)

1 Here, examination of the FRB's staff interpretation leads the  
2 court to conclude that, even if Givens's declaration is taken as  
3 fact, Ashouri's loan to Egerton was primarily for personal, family,  
4 or household purposes. The loan had absolutely no relationship to  
5 Egerton's primary occupation. The loan was not a large one. There  
6 is no evidence before the court that the loan was for the primary  
7 purpose of placing a business office in the residence. The size of  
8 the loan suggests that any enhanced value of Egerton's residence  
9 resulting from any improvements funded by the loan would not  
10 constitute the major portion of the value of the residence, or that  
11 any such value enhancement would be a sizable portion of Egerton's

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12 <sup>6</sup>(...continued)

13 acquire, improve, or maintain rental property that is or  
14 will be owner-occupied within the coming year, different  
15 rules apply:

16 . Credit extended to acquire the rental property is deemed  
17 to be for business purposes if it contains more than 2  
18 housing units.

19 . Credit extended to improve or maintain the rental property  
20 is deemed to be for business purposes if it contains more  
21 than 4 housing units. Since the amended statute defines  
22 dwelling to include 1 to 4 housing units, this rule  
23 preserves the right of rescission for credit extended for  
24 purposes other than acquisition.

25 Neither of these rules means that an extension of credit for  
26 property containing fewer than the requisite number of units  
is necessarily consumer credit. In such cases, the  
determination of whether it is business or consumer credit  
should be made by considering the factors listed in Comment  
3(a)-2.

1 income. (According to Egerton's Supplemental Declaration, filed  
2 April 29, 2003, at the time of the loan, Egerton had listed the  
3 residence for sale at a price of \$589,000, almost 19 times the  
4 amount of the net loan proceeds in the sum of \$31,700.) Indeed, the  
5 FRB's staff interpretation makes clear that even if Egerton hoped to  
6 derive a profit from the sale of his home, this would not  
7 necessarily transform the loan into one that was for commercial  
8 purposes. See Thorns, 726 F.2d at 1418-19. For example, the FRB  
9 staff opines that credit to improve owner-occupied rental property  
10 is deemed to be

11 for business purposes if it contains more than 4 housing  
12 units. Since the amended statute defines dwelling to  
13 include 1 to 4 housing units, this rule preserves the  
right of rescission for credit extended for purposes other  
than acquisition

14 thus suggesting that some profit motive for improving an owner-  
15 occupied dwelling containing four or fewer units does not  
16 necessarily transform the loan into one for business purposes.

17 Here, the property was not even rental property, and did not have  
18 any housing units other than the portion occupied by Egerton. A  
19 fortiori, the loan to Egerton was not necessarily a business loan.

20 All factors considered, the court holds that even if the loan  
21 was to improve Egerton residence in anticipation of sale, as alleged  
22 by Ashouri and as denied by Egerton, it was a loan primarily for  
23 personal, family, or household purposes.

24 /////

25 /////

1 D. When and on What Conditions Must Ashouri Release the Deed of  
2 Trust?

3 Because Ashouri was a "creditor" who made the loan to Egerton  
4 primarily for personal, family, or household purposes, Egerton is  
5 entitled to rescind the deed of trust. 15 USC § 1635(a). But that  
6 is not the end of the story. 15 USC § 1635(b) provides that upon  
7 the obligor's exercise of the right to rescind, the "creditor shall  
8 take any action necessary or appropriate to reflect the termination  
9 of any security interest created under the transaction." The  
10 statute further provides, however, that the prescribed rescission  
11 procedures apply "except when otherwise ordered by the court." Id.

12 The provision authorizing the court to modify the rescission  
13 procedures is consistent with numerous reported decisions holding  
14 that a court may condition the obligor's right to rescind on  
15 repayment of the loan proceeds. See, e.g., LaGrone v. Johnson, 534  
16 F.2d 1360, 1362 (9th Cir. 1976); Palmer v. Wilson, 502 F.2d 860 (9th  
17 Cir. 1974).<sup>7</sup> Here, Egerton agrees that rescission should not be  
18 ordered until he has tendered to Ashouri the required sums, which  
19 Egerton contends is to be an amount equal to the loan principal, 15  
20 USC § 1635(b), less the \$3,500 loan fee, id., less a civil penalty,  
21 15 USC § 1640(a)(2), plus the amount Ashouri advanced to cure  
22 defaults on the senior loan.

23 /////

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24  
25 <sup>7</sup>These decisions preceded the addition of the amendment that  
26 added the "except when otherwise ordered by the court" exception  
to TILA's rescission procedures in 15 USC § 1635(b).

1 Ashouri argues that if the loan is rescinded, Egerton must  
2 tender the funds immediately, that Egerton has made no loan payments  
3 since the inception of the loan, that Egerton has suffered no  
4 damage, and that Egerton obtained the loan through various  
5 misrepresentations as to his intended use of the loan proceeds.

6 These arguments are not well grounded. As to Egerton's alleged  
7 misrepresentations, Ashouri has established none in the present  
8 context, and Ashouri has cited no authority that any  
9 misrepresentations of the type alleged abrogate an otherwise valid  
10 right of rescission under TILA and HOEPA.

11 As to the timing issue, the conditions that the court may place  
12 on rescission are essentially equitable. Lagrone, 534 F.2d at 1362;  
13 Quezner v. Advanta Mortgage Corp., USA, 288 B.R. 884, 888-89 (D.  
14 Kan. 2003) ("the bankruptcy court may impose conditions that run  
15 with the voiding of a creditor's security interest upon terms that  
16 would be equitable and just to the parties in view of all the  
17 surrounding circumstances").

18 The court has not been directed to any authority mandating that  
19 a debtor in chapter 13 must tender the required amounts back to the  
20 lender immediately as a condition to rescission. Most of the cases  
21 cited by the parties mention no time limit beyond those applicable  
22 to the plan itself. See, e.g., In re Wespac, 231 B.R. 768 (S.D.  
23 Cal. 1998); In re Lynch, 170 B.R. 26 (Bankr. D.N.H. 1994).

24 Here, Egerton proposes to treat Ashouri's claim as secured, and  
25 to pay Ashouri the amounts needed for rescission no later than June  
26 30, 2004. Egerton agrees that absent timely compliance, Ashouri's

1 deed of trust will remain on the property, and that no further  
2 rescission claims will be brought. Egerton further proposes to  
3 continue the adequate protection payments previously ordered by the  
4 court to be made during the pendency of this litigation, and other  
5 protections that inure to Ashouri's benefit. The court finds the  
6 conditions proposed the Egerton to be equitable and reasonable.

7 With respect to the amount of the tender, Ashouri argues that  
8 Egerton has shown no actual damages. In re Smith, 289 F.3d 1155  
9 (9th Cir. 2002). The court agrees, and notes that Egerton has not  
10 included actual damages in his calculation of the amount he would  
11 need to tender to obtain a release of the deed of trust.

12 Egerton argues that he is entitled to a civil penalty pursuant  
13 to 15 U.S.C. § 1640(a)(2). That provision imposes a mandatory  
14 penalty against a creditor who fails to comply with TILA in  
15 connection with a debt secured by real property of "not less than  
16 \$200 or greater than \$2,000." Egerton suggests a \$2,000 penalty.  
17 The court finds that \$200 is more equitable, given the absence of  
18 any showing of malice or intentional wrongdoing by Ashouri, and the  
19 fact that, as Ashouri notes, he has lost and will lose significant  
20 interest income in his transaction with Egerton.

21 E. Conclusion

22 The court will grant partial summary judgment in favor of  
23 Egerton as provided in the order filed herewith.

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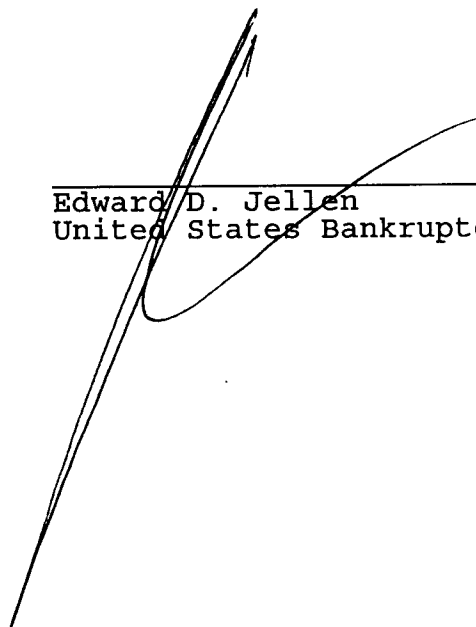
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Dated: June 12, 2003

Edward D. Jellen  
United States Bankruptcy Judge

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